

## Against the Grain

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# Questions and Answers: Copyright Column

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# LEGAL ISSUES



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## Cases of Note — Copyright — Revisiting 1909

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***Twin Books Corporation v. The Walt Disney Company; Buena Vista Home Video***, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 83 F.3D 1162; 1996 U.S. App. LEXIS 11462.

Bambi was not an original creation of **Walt Disney**. Rather it was a book, *Bambi, A Life in the Woods*, written by an Austrian named **Felix Salten** and published in Germany in 1923. It contained no notice to the world of his copyright. By 1926, he woke up and republished, this time with a notice of U.S. copyright. He registered in the U.S. in 1927.

In 1936, **Salten** and publisher assigned certain rights to **Sidney Franklin** who assigned it to **Walt Disney**. The animated film became a huge hit in 1942 and has been re-released seven times. And there was a huge back-end of toys and video cassettes.

**Salten** died in 1945. His daughter and heir, **Anna Salten Wyler**, renewed copyright in 1954. She then negotiated three contracts with **Disney** concerning her rights. When she died, her husband and children assigned all to **Twin Books**.

A dispute erupted, and everyone sued and moved for summary judgment. The district court agreed with **Disney** that *Bambi* was in the public domain.

Yes, that dreadful **1909 Copyright Act** was in effect. **Disney** won, but of course there was an appeal.

### 1909 Act

The **1909 Act**, 17 U.S.C. §§ 1, *et seq.* (superseded in 1976) gave an unpublished work state common law copyright protection from time of creation to publication or registration under the federal scheme. After publication, you could acquire federal protection. Failing in this, it was thrown irrevocably into the public domain.

The **Act** gave the author 28 years of protection, with renewal right of another 28 years.

### 1923 Pub

The German publication failed to meet the **Act's** requirements by not giving notice that U.S. protection was sought. It did, however, prevent it from falling into the public domain in Germany. But **Disney** contends it was fair game in the U.S.

The **1909 Act** required a valid copyright notice. *Nimmer on Copyright* § 7.02(C)(1). See, e.g., *LaCienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir.)(1995).

*But there's still hope for the Salten assignees.*

**Nimmer** tells us that a published work by a foreign author published in a foreign

language in a foreign country may give us a different result in the U.S. It has never been settled by judicial determination. *Nimmer*, at § 7.12(D)(2)(a).



Early cases held it would be public domain. *Universal Film Mfg. Co. v. Copperman*, 212 F. 301 (S.D.N.Y.)(1914).

But in *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260 (1908) the Supreme Court held that Congress did not intend copyright law to have extraterritorial effect.

This was followed by *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) which held it's a "longstanding principle of American law" that our laws only apply within the U.S. unless Congress shows a contrary intent.

*Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) held a song published in Hungary without a U.S. notice but with a subsequent U.S. filing was okay.

**Twin Books** argues that since the 1909 Act had no extraterritorial effect, the 1923 German publication did not throw *Bambi* into U.S. public domain. And the Ninth Circuit found this to be right on point with *Heim*.

U.S. protection was not secured until 1926 when it was published with a U.S. copyright notice. During 1923, '24, '25, anyone could have published it in the U.S. or made a derivative movie.

**Disney** then argued that copyright was up and running from 1923, and the failure to renew in 1951 (within 28 years) dropped the book into U.S. public domain. But since protection didn't begin until 1926, the 1954 renewal was timely.

So **Twin Books** walks away with it. 🐼

## Questions & Answers — Copyright Column

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**QUESTION:** *Why are more books not available electronically? Are publishers concerned about copyright infringement for eBooks?*

**ANSWER:** There are many reasons that not all books are available digitally. More and more works are digitized everyday and publishers are seeing the value of making their backlists available for print-on-demand.

Many works are being published originally as eBooks, either with or without a printed version introduced simultaneously. Authors are self-publishing, and some authors are quite successful without the services that publishers have traditionally provided.

Traditional publishers (sometimes called legacy publishers) have many reasons for not offering digital works. It was only seven

years ago that **Amazon** introduced the Kindle (2007), and the development of good digital reading devices was essential before eBooks could be widely distributed. Today, electronic publishing is growing by leaps and bounds while printed book publishing is on the decline. There are many reasons that some traditional publishers have been hesitant to make their

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works available digitally, and copyright is one of those. First, the publisher must obtain the electronic rights from the author as a separate grant of rights. Then, there are copyright risks with making works available, although these can be reduced significantly with digital rights management. Publishers actually have greater ability to control the use of their works through licensing digital works rather than relying on copyright protection alone. Other reasons that publishers might decide not to make works available digitally include perceived lack of public interest in an individual work, a genre or a particular subject matter; fear of piracy or the lack of a business model to help with the transition from print to digital publishing.

**QUESTION:** *A public library wants to host a public viewing of a foreign film and wishes to seek permission for the performance. How can one seek permission if the library cannot locate the copyright owner?*

**ANSWER:** Locating foreign copyright owners is difficult indeed. One should try organizations such as **Kino Lorber**, which specializes in independent films (<http://www.kinolorber.com/>), the **Motion Picture Licensing Corporation** ([www.mplc.com](http://www.mplc.com/)) or **Movie Licensing USA**, a division of **Swank** (<http://library.movlic.com/>) to determine if these organizations can license performance of the film. If the copy of the film contains the name of the studio, an Internet search may reveal the address and contact information for seeking permission. If all avenues to locate the owner fail, then the library is faced with a decision about whether to host the performance or not. How important this performance is to the library is the crucial question. If it is absolutely essential that the library host this performance, then the library may be willing to assume the risk that the copyright owner will later come forward, complain and demand royalties. If the library still wants to host the performance, the city or coun-



ty attorney for the library should be consulted to assist in evaluating the risks and making the decision.

**QUESTION:** *A school library seeks to create a digital file of 3-D objects which will allow online viewers to control their viewing of the objects. May this archive be mounted on the Web without permission?*

**ANSWER:** The benefits of having a digital archive of 3-D objects for students is clear, but just because something is beneficial does not mean that it is free from copyright concerns. Unless the objects are in the public domain, then permission is required to reproduce them for the archive. Permission to post the archive on the Web is unlikely to be granted, however, since this makes the archive available to the world. Instead, permission probably will be limited to students, faculty and staff of the school, which means that access to the archive must be restricted to the campus community.

**QUESTION:** *In advertising events or for bulletin boards, must the library use the actual book jacket or may it reproduce jackets/images to use for this purpose?*

**ANSWER:** Libraries are permitted to create displays of original works under section 109(c) of the **Copyright Act of 1976**. That section reads: ... "the owner of a particular copy, lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located." This indicates that displaying the original book jacket on a bulletin board or as part of a library display is not an infringement of copyright if the school library owns a copy of the book. Reproducing that jacket may be, however.

It is important to note that often the publisher does not hold copyright on the artwork that is on the jacket. Instead, the publisher has obtained a license to include the artwork on the book jacket for the title. One must question how much damage a single

reproduced copy of a book jacket does to the copyright owner, whether that is the artist or the publisher. The answer certainly is that very little damage is caused, even if the reproduction of the jacket becomes widespread. The book jacket reproduction does not substitute for the book and may lead to increased readership and sales for the book. That said, it is still technically an infringement of copyright.

**QUESTION:** *What should a library do about fair use as defined by recent cases? Should it alter its policies and no longer seek permission for putting materials on electronic reserve or in course management systems?*

**ANSWER:** It is difficult to answer that question since so many of the cases are currently on appeal. If the **Georgia State**<sup>1</sup> case is upheld by the 11th Circuit, then reproducing articles and book chapters for library reserves and course management systems is a fair use and requires no permission. In that case, the judge added an interesting restriction on the third fair use factor, amount and substantiality: "Where a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages in the book is permissible under factor three," thereby creating a 10% rule. The other cases, **Google Books**<sup>2</sup> and **HathiTrust**,<sup>3</sup> really do not apply to individual library uses but are so-called mass digitization cases. They, too, are on appeal. Some libraries have liberalized their policies based on the trial court opinions in these cases, but they must also consider the 10% rule now. Others are waiting until the appeals are settled to make any policy changes. In fact, those libraries that have altered their policies may have to reinstate the more restrictive policies based on the outcome of the appeals and could be liable for damages. This is a matter that should be discussed with university counsel before deciding what approach to take. 🌿

### Endnotes

1. 863 F. Supp.2d 1190 (N.D. Ga. 2012).
2. 770 F.Supp.2d 666 (S.D.N.Y. 2011), rev'd and remanded, 2013 WL 3286232 (2d Cir. July 1, 2013).
3. 902 F.Supp.2d 445 (S.D.N.Y. 2012).

## Rumors from page 47

discount on books? Many famous authors are joining in on both sides. **John Patterson**, **J.K. Rowling**, **Stephen Colbert**, **Malcolm Gladwell**, and many others.

<http://www.bookbusinessmag.com/aggregated-content/indie-booksellers-join-hachettes-battle-amazon>

**Matt Hancox** has been promoted to the **Gale Public Library Sales team** as a **District Manager**. Those of you in the Mid- and South-Atlantic probably know him as your

**Gale Digital Collections Representative** for the better part of the last decade. Of course, **Matt** is excited about the new opportunity, but sad to say "au revoir" to his academic library friends. He says, however, that we couldn't keep him from **Charleston** in November. **Matt** will begin his new duties on July 2nd.

This is a **fun and heart-warming story** that underscores the importance of the printed word. **Betty Fowkes** is 80. When she was 11, her father gave her the book **Magic Australia** by **Nuri Mass** for Christmas, 1944. She lost the book when the family moved, but her daughter, **Liz Crooks** found the book in New York's **Austin Book Shop** sixty-six years later.

The book was perfectly preserved and still had the inscription from **Betty's** father. [http://web.orange.co.uk/article/quirkies/Book\\_finds\\_its\\_way\\_back\\_home\\_after\\_66\\_years](http://web.orange.co.uk/article/quirkies/Book_finds_its_way_back_home_after_66_years)

This story reminds me of a column that **Bob Nardini** wrote for **ATG** about print versus electronic copies of books. Actually, I have looked for the column online (did you know you can search a lot of **ATG back print issues** at **Purdue ePubs**?) but haven't found it yet. In the column, **Bob** talks about how he remembered a college text because it was on his bookshelf and he wonders if he would have remembered the book so vividly had it been in electronic

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